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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1019

LESTER WEBSTER; CARL BRUTSCHE; HARRY FAIRBANKS; CARL J. WILLIAMS; HAROLD E. MOON; ELISHA NUTTER; JOHN G. LACKEY; KENNETH A. SCOTT; EUGENE BILLIET; LEONARD JOHNSON; DONALD STOCKS and DONALD SHOPP, *Petitioners*

vs.

MIDLAND ELECTRIC COAL CORPORATION, a Corporation; MARTHA TERLEKE, ACTING SECRETARY OF THE ILLINOIS COAL OPERATORS ASSOCIATION; THOMAS KENNEDY AS PRESIDENT OF THE INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA; JOHN OWENS AS SECRETARY-TREASURER OF THE INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA; HUGH WHITE AS PRESIDENT OF DISTRICT 12 UNITED MINE WORKERS OF AMERICA; WILLIAM SEARS AS PRESIDENT OF LOCAL UNION 1904 UNITED MINE WORKERS OF AMERICA; and THOMAS NOWERS AS SECRETARY OF LOCAL UNION 1904, UNITED MINE WORKERS OF AMERICA, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

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INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Reasons for Denying the Writ:	
I. The Petitioners have not exhausted their administrative or extra judicial remedies	5
II. The exclusive jurisdiction to determine the validity of the Seniority Clause of the National Bituminous Coal Wage Agreement is vested in the National Labor Relations Board	9
Conclusion	12

Table of Authorities Cited.

Cases:

Bank of Lyons v. County of Cook, 13 Ill. 2d 493, 150 N. E. 2d 97 (1958)	8n
Dixon v. Duffy, 342 U. S. 33	6n
Durley v. Mayo, 351 U. S. 277	6n
Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U. S. 157 (1916)	6
Fay v. Noia, 372 U. S. 391 (1963)	5
Fox Film Corporation v. Muller, 296 U. S. 207 (1935)	5
Henderson v. Eastern Gas and Fuel Associates, 290 F. 2d 677 (4th Cir. 1961)	8n
Humphrey v. Moore, 375 U. S. 335 (1964)	11

International Association of Machinists v. Gonzales, 356 U. S. 617 (1958) 11

International Union v. Star Products Co., 16 Ill. App. 2d 321, 148 N. E. 2d 43 (1958) 10

Local 100 of United Association of Journeymen and Apprentices v. Borden, 373 U. S. 690 (1963) 11

Local 207, Ornamental Iron Workers Union v. Perko, 373 U. S. 701 (1963) 11

National Assn. for Advancement of Colored People v. State of Alabama, 357 U. S. 449 (1958) 6n

Pacaud v. Waite, 218 Ill. 138, 75 N. E. 779 (1905) 6

Payne v. Pullman Co., 13 Ill. App. 2d 105, 141 N. E. 2d 83 (1957) 8n

People v. Goduto, 21 Ill. 2d 605, 174 N. E. 2d 391 (1961) 10n.

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 11

Smith v. Adsit, 83 U. S. 185 (1872) 5

Ward v. Board of County Commissioners, 253 U. S. 17 (1920) 6

Young v. Ragen, 337 U. S. 235 (1948) 6n

Statutes.

United States Code, Title 29, Sections 157 and 158 ..... 10n

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ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

Brief for the Respondents, Thomas Kennedy and John Owens, as President and Secretary-Treasurer of the International Union, United Mine Workers of America; Hugh White, as President of District 12 United Mine Workers of America; William Sears and Thomas Nowers, as President and Secretary of Local Union 1904, United Mine Workers of America, Respondents, in opposition.

Respondents pray that the Petition for a Writ of Certiorari to review a judgment of the Appellate Court of Illinois, Second District, be denied.

OPINION BELOW.

The opinion of the Appellate Court, (an intermediate appellate court in Illinois) is reported in 43 Ill. App. 2d 359, 193 N. E. 2d 212, and is recorded in full in the appendix to the petition.

The Supreme Court of Illinois denied leave to appeal on January 21, 1964 (App. 14a).

JURISDICTION.

It is respectfully submitted that the opinion of the Illinois Appellate Court, affirmed by the Supreme Court of Illinois by its refusal to entertain a petition for leave to appeal by the Petitioners here, rests on independent and adequate state grounds. In this situation, there is no federal question to invoke the jurisdiction of this court.

QUESTIONS PRESENTED.

The first question was admittedly not the basis of the opinion of the Illinois courts, but was a collateral matter mentioned only by way of dicta. This is not sufficient to confer jurisdiction on this court.

The second question is not involved in the pleadings in this case. In none of the pleadings filed in the trial court and certainly not in the pleadings in its final form, do the Petitioners allege fraud or collusion between the union and the employer. This question was not presented to the courts of Illinois and cannot be presented here.

The third question involves the propriety of the state courts' ruling on a matter of state law. The decision of

the Illinois courts was predicated on Illinois law and their decision was not so ill-founded as to give jurisdiction to this court.

STATEMENT.

The real gravamen of the cause of action in this case is contained in the original complaint filed in the Circuit Court of Henry County, Illinois, by the Petitioners. In that complaint, the plaintiffs sought to have the court follow the seniority agreement entered into at the local mine, being a bump back seniority agreement rather than the seniority agreement contained in the National Bituminous Coal Wage Agreement. The Petitioners' real purpose was to nullify the seniority provisions of the National Agreement.

Subsequently, these Petitioners filed a first and then a second amended complaint and made amendments to these complaints on many occasions. The complaint in its final form and in the form in which it was presented to the appellate courts of Illinois was a suit at law for damages.[1] As far as the union was concerned, it was a class action by the Petitioners against certain officers of the union as representative of the class. Although the second amended complaint in its initial form was labeled as a suit for declaratory judgment, Petitioners sought only money damages.[2] The only equitable issue involved in the second amended complaint was abandoned by the Petitioners when

1. There is no allegation in the second amended complaint to the effect that union defendants attempted to influence or induce a contract breach by the employer, as is claimed by Petitioners at page 2 and page 4 of their petition.

2. The fact that Petitioners regard this suit as one for damages and not as one for a declaratory judgment is shown at page 38 of the brief prepared for the Supreme Court of Illinois, where they said "Plaintiffs dismissed Count 5 of the Second Amended Complaint, which is the only count seeking any relief other than damages".

on their motion, Count V of the complaint was stricken in the trial court and before the trial court ruled on the sufficiency of the pleadings.

Petitioners admit that the Appellate Court based its decision on their failure to properly exhaust their extra judicial remedies. The comments of the Illinois Appellate Court concerning the exclusive jurisdiction of the National Labor Relations Board were not essential to its decision. The preemption issue was one of a number of collateral issues which might have been relied upon by the Illinois Court in its decision. However, the Illinois Appellate Court based its decision on the failure of the Petitioners to exhaust their extra judicial remedies.

REASONS FOR DENYING THE WRIT.

I.

THE PETITIONERS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE OR EXTRA JUDICIAL REMEDIES.

As stated in the petition (pp. 4-5), the Illinois Appellate Court affirmed the trial court on the *principal* ground that Petitioners had not exhausted their administrative remedies, and on an *additional* ground that the dispute is within the exclusive jurisdiction of the National Labor Relations Board.

The Supreme Court of the United States will review a decision of a state court only where it appears from the record that a federal question was presented to the highest state court having jurisdiction and that its decision on the federal question was necessary to the determination of the cause. Where a decision might have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain judgment, the Supreme Court will not undertake to review it. If the independent state ground was not a substantial or sufficient one, it will be presumed that the state court based its judgment on the federal question, and the Supreme Court will then take jurisdiction.

The Supreme Court does not review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds. *Fay* v. *Noia*, 372 U. S. 391 (1963). Its jurisdiction fails if the independent non-federal ground is adequate to support the judgment, *Fox Film Corporation* v. *Muller*, 296 U. S. 207 (1935), even though a federal question may have been decided erroneously therein. *Smith*

v. *Adsit*, 83 U. S. 185 (1872). Jurisdiction does not turn on whether the decision of the state court was right or wrong, but merely if it had fair support. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 157 (1916).

State grounds must be "plainly untenable" or "without any fair or substantial support" to be regarded as inadequate. *Ward v. Board of County Commissioners*, 253 U. S. 17 (1920). This degree of inadequacy is found only rarely and in extreme situations.[3]

It is well established in Illinois that members of an organization bind themselves to the provisions of its Constitution and By-Laws. *Pacaud v. Waite*, 218 Ill. 138, 75 N. E. 779 (1905). The Constitution of the United Mine Workers assumes judicial authority over its members, and upon joining the Union, Petitioners agreed to accept this judicial authority in matters relating to union affairs.[4]

Petitioners do not allege in their complaint that they have taken any of the steps available to use this mechanism to compel action by their officers.

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3. An example of an extreme situation is found in *National Assn. for Advancement of Colored People v. State of Alabama*, 357 U. S. 449 (1958). The Alabama Supreme Court had clearly laid down in prior decisions the rule that certiorari could be used to review legal questions. In this case, however, certiorari was limited to questions of jurisdiction, the court saying that mandamus was the proper remedy. This was held to be "without any fair or substantial support", thereby subjecting the non-federal grounds to review.

See also *Durley v. Mayo*, 351 U. S. 277; *Dixon v. Duffy*, 342 U. S. 33; *Young v. Ragen*, 337 U. S. 235.

4. Article III, Section 1 of the Constitution of the International Union, United Mine Workers of America, provides as follows:

"• • • The International Union shall have supreme legislative, executive and judicial authority over all members and subordinate branches, and shall be the ultimate tribunal to which all matters of importance to the welfare of the membership and subordinate branches shall be referred for adjustment • • •" (Add. Abst. 14-15).

It must be remembered that the requirements of the Union Constitution and of the National Agreement differ. The grievance procedures of the National Agreement relate to disputes between the Union or its members and the mine operators. Any complaint against an officer of the Union must be presented and disposed of in accordance with the requirements of its Constitution not the National Agreement.[5]

This litigation basically involves the interpretation of the seniority provisions of the National Agreement. When Petitioners felt they had a grievance under the National Agreement, they were obliged to follow the five-step grievance procedure set forth in that contract (Add. Abst. 20-21), the concluding paragraph of which provides:

> "A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

Petitioners' allegation that their claim was denied at a meeting of mine and union representatives is therefore a decision reached at that particular stage of the proceedings and binds the parties to the contract. Whether you accept the MacAffee affidavit (Add. Abst. 25) stating that no grievance was filed, or the Petitioners' contention that

5. The Constitution provides. Article XVIII is entitled "Charges and Methods of Trials" and consists of seven sections (Ad. Ab. 18-20), which, together with Section 3 of Article III (Ad. Ab. 16), of the Constitution, provides an exact procedure to be followed when any officer of an organization or any member not an officer "is accused of violating any of the Organization's laws or any transgression against the Organization or any of its officers or members."

These sections provide that the charge must first be prosecuted before the local union of which the alleged offender is a member and that the decision of the local union shall close the case; then provides for appeal to the next highest tribunal and authority until a final decision is reached, under Section 3 of Article III.

they completed the first two stages of the grievance procedure with its necessary corollary that a final decision was reached at that point, it must be evident that Petitioners have no complaint to this Court.[6]

Petitioners admit that it is necessary in Illinois to exhaust all administrative remedies before recourse to the courts, but they seek to evade this requirement by arguing that it is not necessary when to do so would be "illusory and futile". They claim that this is the case in this instance.

Unlike Wisconsin and some other jurisdictions, Illinois is very strict in granting exceptions to the exhaustion of remedies doctrine due to futility.[7] There is certainly noth-

6. The record discloses that the alleged grievances were heard and considered by representatives of the employer, the petitioners and the union, and the complaints were found in each instance to be without merit.

Henderson v. *Eastern Gas and Fuel Associates*, 290 Fed. 2d 677 (4th Cir. 1961) presented a situation similar to the case at bar. That court said at p. 680:

"Where the collective bargaining agreement provides a grievance procedure leading to arbitration, individual employees must look to that procedure and are bound by it just as are unions and employers. They cannot bypass the method prescribed in the contract for obtaining relief, either by failing to exhaust the grievance procedure or by ignoring the determination reached by such procedure if they have exhausted it and litigate the merits of their claims in court."

See also *Payne* v. *Pullman Co.*, 13 Ill. App. 2d 105 (1st Dist. 2d Div. 1957).

7. *Bank of Lyons* v. *County of Cook*, 13 Ill. 2d 493, 150 N. E. 2d 97 (1958) is strikingly similar to the case at bar and shows how strong a showing of futility must be to have effect in Illinois. In the *Lyons* case, plaintiff filed suit immediately after its attorney was told by the secretary of the Zoning Board of Appeals not to bother to file for a variance to build a trailer park, as the Board of County Commissioners had decreed that no more land was to be re-zoned for such use. The Illinois Supreme Court held that the secretary's opinion did not justify plaintiff's failure to exhaust its administrative remedies, saying at p. 497:

"The necessity for making application before the board is not dispensed with because the application may be denied. The rule requiring resort to an administrative agency in the first instance

ing in the complaint or the affidavits to indicate that the International Union, United Mine Workers of America had decided to deny the Petitioners the relief they sought.

No claim for failure to fairly represent union members can be sustained in this case as the union constitution provides a remedy for such complaints. That remedy was not pursued by Petitioners.

The union constitution, Article III, Section 3 (Add. Abst. 15) requires that a copy of a complaint against an officer of the union or against a fellow member be delivered to the member about whom the complaint is made. Having failed to give even a simple written notice of their complaint, Petitioners cannot now question the holding of the court below that their efforts were informal and ineffective.

The Illinois Appellate Court had therefore an independent and adequate state basis for its decision. This decision did not rest on a federal question, and there is no reason for the Supreme Court to review the state court judgment.

II.

THE EXCLUSIVE JUDISDICTION TO DETERMINE THE VALIDITY OF THE SENIORITY CLAUSE OF THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT IS VESTED IN THE NATIONAL LABOR RELATIONS BOARD.

Petitioners' original complaint discloses that they seek to enforce a local seniority agreement over the provisions of the National Agreement by claiming that this Agreement is not a valid contract with reference to seniority.

Illinois has recently held that the National Labor Re-

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is in the interest of orderly procedure. It cannot be avoided by evidence of an intent to deny the relief sought * * *. We conclude that a remedy before the zoning board of appeals was available, and that having failed to seek such relief, the plaintiff was not entitled to maintain the present proceedings."

lations Board has the exclusive power to adjudge the validity of a contract and that determination of the validity of a collective bargaining agreement in interstate commerce is exclusive in the Board. *International Union* v. *Star Products Co.*, 16 Ill. App. 2d 321, 148 N. E. 2d 43 (1958):

In another recent decision, Illinois has held that when a form of activity is "arguably subject" to Section 7 or Section 8 of the National Labor Relations Act[8], the states must yield to the primary jurisdiction of the NLRB for a clear determination of the case[9]. Although Petitioners state emphatically that the issues herein are not within the scope of these sections, there are at least two valid theories whereby this dispute would be arguably subject to National Labor Relations Board jurisdiction under Section 7 and Section 8.

First, by Section 8 (b) (1) (A), it is an unfair labor practice for a union to interfere with the exercise by employees of the rights guaranteed in Section 7, one of which is the right to bargain collectively through representatives of their choosing. Second, by Section 8 (b) (3), it is an unfair labor practice for a union to refuse to bargain collectively with an employer. Section 8 (d) defines collective bargaining as "meeting at reasonable times to confer in good faith with respect to any question arising under the agreement between an employer and a representative of the employee."

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8. U.S.C.A. Title 29, Secs. 157 and 158.

9. *People* v. *Goduto*, 21 Ill. 2d 605, 174 N. E. 2d 391 (1961), wherein the court said at p. 608:

"We recognize that when an activity is protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act, the states must abstain from regulation (citing cases) and when the activity is arguably subject to Section 7 or Section 8 of the Act, the States must yield to the primary jurisdiction of the National Labor Relations Board for a clear determination of the case (citing cases)".

The existence of a legitimate question in this area was recognized by the Supreme Court of the United States in *Humphrey* v. *Moore*, 375 U. S. 335 (1964), quoted as follows in Petitioners' brief at page 7:

> "Although there are different views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here."

Two 1963 cases in the Supreme Court of the United States are particularly applicable to the instant case. They are *Local 100, of United Association of Journeymen and Apprentices* v. *Borden*, 373 U. S. 690 (1963) and *Local 207, Ornamental Iron Workers Union* v. *Perko*, 373 U. S. 701 (1963). Both cases involved alleged interference by the union with the employment of a member, and as such were held to be properly subject to the exclusive jurisdiction of the NLRB.

Petitioners' effort to distinguish *Borden* and *Perko* raises only superficial points of difference not pertinent to the basic holdings therein.

The instant case does not involve purely internal matters of union membership, as did *International Association of Machinists* v. *Gonzales*, 356 U. S. 617 (1958), nor does it present an issue of overriding state interest such as the maintenance of peace and order, as did *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959). Inasmuch as Illinois has consistently and properly referred matters "arguably subject" to the NLRB to that Board for decision, nothing would be gained by asserting federal jurisdiction in this instance.

It should also be noted that many jurisdictions have statutes permitting class actions against unincorporated associations. Illinois has no such statute, and suits are not

permitted against unincorporated associations, such as unions. This was one of several grounds raised before the Illinois Appellate Court on which this suit could have been decided. This, like the preemption question, was not however the basis for its decision.

CONCLUSION.

The decision in this case is not of such importance as to require the attention of this Court. The decision of the Illinois Appellate Court is based on Petitioners' failure to exhaust all administrative remedies available to them. The existence of this adequate nonfederal ground makes it unnecessary and inadvisable for the court to consider this case.

Respectfully submitted.

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